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Supreme Court, U.S.
FILED
MAR 17 2011
OFFICE OF THE CLERK

No. 10-384

In the Supreme Court of the United States

SHOLAM WEISS,

Petitioner,

v.

STAN YATES, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I

No Case Cited by Respondent Stands for the Proposition that a District Court Has Authority to Re-Sentence a Prisoner Whose Conviction Has Been Final for a Decade When the Prisoner Makes No Claim in His Habeas Corpus Petition that His Conviction or Sentence is Invalid

Respondent argues that Petitioner is incorrect in maintaining that only §2255 grants a court the authority to vacate a conviction and modify a sentence. See 28 U.S.C. §2255(a) (Supp. III 2009) (stating that court may "vacate, set aside or correct the sentence"). Generally, Respondent argues that §2243 gives broad discretion to federal courts to dispose of a habeas petition under Section 2241 "as law and justice require." Opp. 10.

However, all the cases cited by Respondent, in which courts invoked habeas authority, were cases in which federal courts discussed remedies in broad language, were early cases before §2255 became law, were actually §2254 cases, were §2241 cases that only challenged custody rather than conviction or sentence, or were §2241 cases that responded to actual challenges to a conviction or sentence through the §2255(e) savings clause.

None of these cases implies, let alone holds,

that a district court has broad authority under §2241 to set aside a long-final conviction or sentence simply because the district court believes it would be a contribution to justice. And none of these cases implies, let alone holds, that a habeas court under may reopen a judgment that never challenged by the §2241 habeas petitioner..

As Respondent concedes, Petitioner has never challenged either the imposition of his conviction or his sentence and properly filed his petition pursuant to §2241 to challenge his detention rather than the judgment of conviction and sentence. Opp. 9. Thus, the question is whether a habeas court in a §2241 proceeding may reopen a final judgment that has never been challenged by the petitioner.

Hilton v. Braunskill, 481 U.S. 770 (1987), for example, concerned only the broad power of a court to stay its own order, not to attack a judgment of conviction.

In re Bonner, 151 U.S. 242 (1894), involved a habeas corpus challenge to the imposition of sentence and commitment of a prisoner and was decided long before adoption of 28 U.S.C. § 2255 provided the remedy for a federal prisoner attacking his sentence.

Carafas v. LaVallee, 391 U.S. 234 (1968), addressed the question whether a petitioner who had been in state custody remained "in custody" for purposes of 28 U.S.C. §2254 after his sentence

was completed because his past conviction continued to harm his business and personal life. *Peyton v. Rowe*, 391 U.S. 54 (1968) is another §2254 case in which the Court addressed the "in custody" requirement of federal habeas corpus and found that a petitioner was "in custody" if the claim involved a future consecutive sentence.

Burkett v. Fulcomer, 951 F.2d 1431 (3d Cir. 1991), dealt with a state prisoner's § 2254 habeas petition (not §2241), attacking his convictions and sentences as a result of post-trial delay.

Bryant v. United States, 214 F. 51 (8th Cir. 1914), a pre §2255 case, involved a prisoner who challenged the sentence imposed upon him as unauthorized by law. *United States v. Pridgeon*, 153 U.S. 48 (1894), another pre §2255 case, was an action by a federal defendant challenging both his conviction and sentence.

Boumediene v. Bush, 553 U.S. 723 (2008) has already been distinguished by Petitioner (Pet. 20-21), and involved the power of a court to correct errors in the government's decision to hold a person – the exclusive role of § 2241.

Respondent cites a number of cases in support of his argument that §2241 may be used to challenge the imposition of his conviction and sentence under the §2255(e) savings clause when §2255 is "inadequate or ineffective." Opp. 11-12. In *United States* v. *Triestman*, 178 F.3d 624, 629 (2d Cir. 1999), a habeas petitioner was allowed to

challenged his conviction and sentence under §2241 when that court found that a procedurally barred §2255 was inadequate and ineffective because petitioner's claim involved a constitutional defect. As Petitioner has pointed out (Pet. 18 n.4), all other circuits, including the 11th Circuit, have rejected *Triestman* as too broad and have limited the savings clause to where a petitioner can show actual innocence and retroactivity. *Reyes-Requena v. United States*, 243 F.3d 893, 903 (5th Cir. 2001) (collecting cases); *Wofford v Scott*, 177 F.3d 1236, 1243 (11th Circuit 1999).

Respondent argues that the cases relied upon by Petitioner merely stand for the proposition that defendants challenging their convictions or sentences must "ordinarily" use §2255, less §2241 be used to circumvent the procedural limitations on §2255. Opp. 12. In fact, the cases cited by Petitioner (Pet. 14-18) explicitly state that challenging the conviction or sentence is the "exclusive remedy" of §2255, except in very rare cases where the savings clause of §2255(e) is used. *Antonelli v. Warden*, 542 F.3d 1348, 1352 n.1 (11th Cir. 2008). Further, "[a] prisoner in custody pursuant to a federal court judgment may proceed under §2241 only when he raises claims outside the scope of §2255(a), *that is, claims concerning execution of his sentence*" (emphasis added). Id.,

citing *Darby v. Hawk-Sawyer*, 405 F.3d 942, 945 (11th Cir. 2005).[1]

II

The Reality in This Case is That the United States Assured Austria that if Austria Denied Extradition on One Count, A Federal Court Would Be Required to Conduct a Re-Sentencing for Petitioner and that the Re-Sentencing Would Restore Petitioner's Right to Appeal, and the United States Was Unable Fulfill its Assurances to Austria

The United States assured Austria in its February 8, 2002 letter to the Austrian Ministry of Justice that, if extradition were denied on at least one count, the United States would file a motion seeking a re-sentencing in the district court and maintain that the re-sentencing is required, appropriate, and sufficient to provide a full right of appeal. Pet. App. 98.

In its May 14, 2002 letter to the Austrian Ministry of Justice, the United States assured Austria that, if extradition was denied for offenses involving false statements, "the presiding United States judge would be required to re-sentence Weiss in order to give effect to the condition" and "this would result in Weiss being permitted to file a full appeal on all issues." Pet. App. 95.

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[1] As already noted (Pet. 15), it is because §2241 is not used to challenge the conviction or sentence that Congress exempted it from the gate keeping requirements of the Antiterrorism and Effective Death Penalty Act of 1996.

Based on these binding assurances, which Austria relied upon when presenting them to its own courts, the European Human Rights Court, and the United Nations Human Rights Committee (Pet. 9-10), Austria extradited Petitioner to the United States.[2] The United States was unable to obtain a re-sentencing, as it assured Austria it would.

Petitioner then filed his habeas corpus petition under §2241. He did not challenge his conviction or his sentence. Instead, (standing in the shoes of Austria), he claimed his custody was in violation of the extradition treaty and terms of extradition, and sought a remedy of either release or return to Austria, the appropriate remedy under §2241.

The district court denied this remedy and instead directed petitioner to request that the court re-sentence him by striking the sentence on count 93 for which extradition was denied. Petitioner complied, although at all times he made clear that he was not challenging the conviction or the imposition of any part of his sentence in his habeas petition.

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[2] See Austrian diplomatic note (Pet. App. 92). Respondent notes in its facts that the lower Austrian court authorized extradition, but does not note the exclusive power of the Austrian Minister of Justice to deny extradition on the issue of the right of appeal, which he did on May 10, 2002 to obtain the further assurances given on May 14, 2002. See Pet. 9-11.

Despite the fact that Petitioner made no claim of any deficiency in his judgment, the district court ruled that it could undo his final judgment in order to find some way for the United States to fulfill the binding assurances it gave Austria.

Petitioner submits that there is no law – certainly none cited by Respondent – that permits a district court to set aside a long-final judgment in a criminal case, or to reinstate an appeal long ago dismissed with prejudice, in an effort to assist the Executive in fulfilling assurances that it knew or should have known could not be kept.

III

The District Court Found, and the Court of Appeals Affirmed, that the United States Communications Created Obligations Regarding the Rule of Specialty

Respondent argues that the district court found that any United States' communications given to Austria were immaterial to the United States obligations under the rule of specialty. Opp at 6, 9, 14. This is a misreading of the decisions below. [3]

Although the district court rejected Petitioner's claim that the United States was obligated to provide a full re-sentencing, the

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[3] See generally 11th Circuit Opinion of April 20, 2010 (Pet. App. 1-5); district court *Order on all Pending Matters* of July 16, 2009 (App. 6-13); district court *Memorandum Opinion* of December 15, 2008 (Pet. App. 14-45).

district court found that the United States communications obligated the United States to provide a full appeal of his conviction and sentence to fulfill the rule of specialty:

> ...it is the intention of the Court through reentry of the judgment to revive the Petitioner's right of appeal in compliance with the rule of specialty...

District Court Order, Pet. App. 8-9

Specifically, Respondent argues that the district court rejected Petitioner's claim that the United States' communications about "the procedural device that would result in obedience to the rule of specialty" constituted conditions on petitioner's extradition or were material to the United States' compliance with the rule of specialty. Opp. at 6, quoting from the district court's *Memorandum Opinion*, Pet. App. 36. The above quote is taken out of context.

In his habeas proceedings, Petitioner claimed that the United States made misrepresentations of procedural law to Austria. The district court found that, indeed, the assurance the United States gave Austria that the presiding judge would be required to re-sentence Petitioner was wrong. However, the district court also found:

> If there was a misrepresentation concerning the nature of the procedural device that would result in obedience to

> the rule of specialty, it simply does not matter, in so far as the Treaty obligations are concerned (as distinguished from the possible disciplinary inquiries) as long as the rule of specialty is honored in the end.

Pet. App. 36.

The crucial phrase ignored by the Respondent is "as long as the rule of specialty is honored in the end." On the issue on how to honor the rule of specialty, the district court, relying on the United States communications and the June 18, 2008 diplomatic note from Austria, found that it required both:

> (1) elimination of any criminal sanction as to Count Ninety Three; and (2) a resulting plenary appeal from the judgment as a whole.

Pet. App. at 37.

In affirming, the 11th Circuit stated:

> The district court found that the communications by the United States required only the elimination of Count 93 and a full appeal of his conviction and the new sentence without Count 93. This, the district court found, would fulfill the obligations of the United States under the rule of specialty.

Pet. App. at 3-4.

The Court of Appeals noted the government's opposing argument that the United States Communications were not conditions, but stated that it would not address this argument (resurrected by the Solicitor General in its Opp.) because the government did not cross-appeal. Pet. App 4, n.4.

IV

It is Important for this Court to Decide What Remedy is Required Where the United States Provides Binding Assurances to Another Nation to Obtain Extradition and Cannot Fulfill those Assurances

Petitioner relies upon *Johnson* v. *Browne*, 205 U.S. 309 (1907), for the proposition that where an individual has been extradited to the United States as a result of binding assurances provided to the extraditing nation and the United States cannot fulfill its commitment to the extraditing nation which continues to insist upon fulfillment, the remedy is to release the individual or to return the individual to the extraditing country.

Respondent argues (Opp. 16) that compliance with the United States' obligations to Austria "did not require petitioner's complete release" and that "as the district court pointed out (Pet. App. 39-40), it would be inappropriate to grant more relief than necessary to avoid a violation of the Treaty."

The problem with Respondent's argument is that it rests upon the unsupported argument, discussed above, that a district court may simply reopen a criminal judgment and modify it as it pleases in order to help the United States fulfill assurances even though there is no constitutional defect or showing of actual innocence. This argument plays fast and loose with the basic principle that federal jurisdiction is limited and federal courts must comply with the rule of law. As noted above, Respondent cites no authority to support the notion that a federal court can modify a final judgment in a criminal case that is valid on its face and not alleged to be deficient in any way simply because it might make it easier for the United States to meet obligations that it voluntarily assumed vis-à-vis foreign nations.

Respondent's argument is the antithesis of adherence to a rule of law. It would permit a federal court to modify a final criminal judgment that is valid in every respect under American law and reinstate an appeal denied with prejudice for over a decade simply because the Executive made a promise to another country. If this is so, the Executive has the power to modify all judicial judgments and to ignore all limits on judicial jurisdiction simply by making commitments to foreign states that are not authorized by United States law. A more dangerous assault on the rule of law is difficult to fathom.

V

Austria Was Promised That Petitioner Would Receive a Full Re-Sentencing

Petitioner agrees with Respondent that, ordinarily, Petitioner's claim regarding a full re-sentencing – that the lower court was incorrect that the United States was only obligated to vacate count 93 – would not present the type of issue that this Court would review. But, this is no ordinary case.

As discussed above, the district court exercised jurisdiction beyond what has been done before in a habeas case in an attempt to avoid having to hold that Petitioner was detained in violation of the extradition treaty. The district court was at pains to fulfill the assurances that the United States gave to Austria, and the district court could find no authority for a full re-sentencing. It therefore distorted the assurances for a full re-sentencing to appear to support only the striking of one count and accompanying sentence (leaving Petitioner with an unprecedented 835-year sentence in violation of United States' assurances).

The United States assured Austria in its February 8, 2002 letter (Pet. App. 98) that, if extradition were denied on one or more counts, the district court would "re-sentence Mr. Weiss, considering only those Counts of the conviction for which he is extradited from Austria." This was an

assurance of a full re-sentencing on all counts for which extradition was granted. [4]

Further, as Petitioner argued (Pet. 34), when the district court ordered the vacating of count 93, it was also required to do a full re-sentencing under *United States v. Booker* 543 U.S. 220 (2005), considering all factors under 18 U.S.C. §3553(a). This would include all relevant post-sentencing evidence such as rehabilitation. *Pepper v. United States* __U.S. __(2010).

Respondent's suggestion that Petitioner may bring this argument in his direct appeal overlooks the fact that the district court vacated count 93 to fulfill treaty obligations and the issue of treaty obligations is what is now before this Court. [5]

CONCLUSION

Petitioner respectfully submits – for the reasons stated in his Petition and in this Reply – that the question whether a district court may set

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[4] Under the rule of specialty (in light of the US communications), Petitioner may only be punished on those counts that have been re-sentenced with a right to a full appeal, and absent a re-sentencing and right to a full appeal he remains in custody in violation of the treaty. Pet. 28, 29.

[5] Almost nine years ago, in an attempt to fulfill their assurance to Austria, the government made two motions for a full re-sentencing that were denied for lack of authority. If this Court now finds authority for this right to be granted, it should certainly be given without delay to honor the treaty obligations.

aside a valid conviction and sentence in a habeas corpus proceeding brought pursuant to § 2241 when the petitioner does not challenge the imposed conviction, sentence or judgment is a serious one.

Petitioner also submits that the question whether a district court can afford extraordinary relief under §2241 or §2243 in order to prevent the Executive from reneging on assurances made to another Nation is equally important.

It is not the place of federal courts to try to stretch jurisdictional statutes and procedural rules to save the Executive from its own excesses, which is what happened in this case. The limits of courts to modify their judgments are imposed by law and must be respected, and those limits may not be exceeded to avoid exposure of the reality that the United States made assurances to another Nation that it is unable to keep.

Petitioner further respectfully submits that the question of what remedy is required when an extradition is obtained by false pretenses is worthy of this Court's consideration. The Court's last word on this was *Johnson* v. *Browne*, 205 U.S. 309 (1907), and it is important to know whether or not a genuine remedy for a violation of extradition treaty assurances is still required by American law.

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